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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

RUSSELL COHEN

Plaintiff,

vs.

STATE OF NEVADA, *et al.*,

Defendants.

3:07-cv-0043-LRH (VPC)

**REPORT AND RECOMMENDATION  
OF U.S. MAGISTRATE JUDGE**

November 27, 2007

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' motion to dismiss (#17). Plaintiff failed to file an opposition. Defendants filed a reply (#21). The court has thoroughly reviewed the record and the motion and recommends that defendants' motion to dismiss (#17) be granted.

**I. HISTORY & PROCEDURAL BACKGROUND**

Plaintiff Russell Cohen ("plaintiff"), acting *in pro se*, is incarcerated in the custody of the Nevada Department of Corrections ("NDOC") at Nevada State Prison ("NSP") (#7). Plaintiff brings his complaint pursuant to 42 U.S.C. § 1983, alleging fifteen civil rights violations under various constitutional amendments and statutory provisions. *Id.* Plaintiff names as defendants the State of Nevada, the NDOC, and, including John Does, approximately ninety individual defendants employed by NDOC. *Id.*

Plaintiff filed his complaint on May 2, 2007.<sup>1</sup> *Id.* On August 31, 2007, defendants filed

<sup>1</sup> Pursuant to 28 U.S.C. § 1915A, the court screened plaintiff's complaint and dismissed all claims against the State of Nevada and NDOC except plaintiff's RLUIPA claims, all claims for monetary relief from individual defendants in their official capacities except as to plaintiff's RLUIPA claims, and all claims under 18 U.S.C. §§ 241 and 242 (#5). Plaintiff thereafter filed a notice of appeal to the Ninth Circuit Court of Appeals, which the Ninth Circuit dismissed for lack of jurisdiction on October 3, 2007 (#19).

1 the current motion to dismiss (#17). The court issued its standard *Klingele* order on September  
 2 4, 2007, informing plaintiff of his responsibilities in responding to a dispositive motion (#18).  
 3 Plaintiff did not file an opposition. On October 8, 2007, defendants filed a reply (#21). On  
 4 October 23, 2007, this court issued an order *sua sponte* granting plaintiff an extension of time  
 5 until November 16, 2007, to file a motion in opposition (#23). The order stated that the court  
 6 would grant no further extensions of time and that defendants' motion to dismiss would be  
 7 submitted to the court unopposed should plaintiff fail to file a response. *Id.* To date, plaintiff has  
 8 not filed a motion in opposition to defendants' motion to dismiss.

9 The Court notes that the plaintiff is proceeding *pro se*. "In civil rights cases where the  
 10 plaintiff appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff  
 11 the benefit of any doubt." *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th  
 12 Cir. 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

## 13 II. DISCUSSION & ANALYSIS

### 14 A. Discussion

#### 15 1. Motion to dismiss for failure to state a claim

16 When considering a motion to dismiss for failure to state a claim upon which relief can  
 17 be granted, all material allegations in the complaint are accepted as true and are construed in the  
 18 light most favorable to the non-moving party. *Erikson v. Pardus*, 127 S.Ct. 2197, 2200 (2007);  
 19 *Barnett v. Centoni*, 31 F. 3d 813, 816 (9th Cir. 1994). For the movant to succeed, it must appear  
 20 beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle  
 21 him to relief. *Barnett*, 31 F. 3d at 816; *see also Rothman v. Vedder Park Mgt.*, 912 F.2d 315, 316  
 22 (9th Cir. 1990). Pursuant to section 1983, plaintiff must allege that (1) defendants subjected him  
 23 to the deprivation of a right, privilege or immunity guaranteed by the U.S. Constitution or U.S.  
 24 law, and (2) that the defendant acted under the color of state law. *West v. Atkins*, 487 U.S. 42,  
 25 48 (1988); *see also Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991).

### 26 B. Analysis

27 Defendants generally argue that plaintiff's interest in bringing this suit is to "vex, annoy  
 28 and harass every prison official he has had contact with" within NDOC (#17). Defendants note

1 that the sixty-nine individuals who have appeared in this action are spread over five different  
 2 NDOC institutions, and that plaintiff generally alleges multiple violations occurring between  
 3 January 2005 and the present, making it nearly impossible for defendants to respond to plaintiff's  
 4 allegations.

### 5 **1. Claims Lacking Basis in Law**

6 Defendants contend that the criminal provisions in 18 U.S.C. §§ 1001, 1621, and 1518  
 7 do not provide a basis for civil liability (#17, pp. 3-6). The court has reviewed these statutes and  
 8 agrees. *See Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980) (holding that statutes which  
 9 provide for punishment by fine or imprisonment do not create privately enforceable rights, give  
 10 rise to civil liability, or provide a basis for lawsuits pursuant to the Civil Rights Act); *see also*  
 11 *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (holding that private rights of action must be  
 12 created by Congress and the court's role is to determine whether the statute displays such intent).

13 Defendants further maintain that 42 U.S.C. § 10841, the Restatement of Bill of Rights for  
 14 Mental Patients, does not create a private right of action. Again, the court agrees. *See Yang v.*  
 15 *California Dept. of Social Services*, 183 F.3d 953, 958 (9th Cir. 1999) (citing affirmatively a First  
 16 Circuit case which held that section 10841 did not create any enforceable federal rights); *see also*  
 17 *Smith v. Au Sable Valley Community Mental Health Services*, 431 F.Supp.2d 743, 751-52 (E.D.  
 18 Mich. 2006) (Section 10841 does not create a private right of action).

19 Finally, defendants argue that 18 U.S.C. § 1061, now codified at 18 U.S.C. § 1038, while  
 20 allowing a private right of action, is inapplicable to the present case. A review of section 1038  
 21 and the subject matter of plaintiff's complaint reveals that defendants are correct.<sup>2</sup>

22 The court grants defendants' motion to dismiss as to these statutes.

### 23 **2. Claims Lacking Basis in Fact**

24 Defendants next contend that the remainder of plaintiff's complaint is "a wandering prolix  
 25

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26 <sup>2</sup> 18 U.S.C. § 1038 provides for criminal and civil penalties when a person provides false information  
 27 or conducts a hoax with respect to crimes relating to aircraft and motor vehicles, biological weapons,  
 28 explosives and combustibles, the importation, manufacture, distribution, and storage of explosive materials,  
 firearms, shipping, terrorism, the Atomic Energy Act, or the destruction of an interstate gas pipeline facility.

1 of vague conclusions intermixed with legal citation and argument that fail to identify the actions  
 2 of any particular defendant or relevant dates" (#17, p. 2). Defendants maintain that it is  
 3 impossible to respond to plaintiff's allegations because the complaint altogether fails to meet the  
 4 requirements of Federal Rule of Civil Procedure 8. *Id.*, pp. 2 and 10.

5 Recently, the United States Supreme Court reaffirmed that Rule 8(a)(2) "requires only 'a  
 6 short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts  
 7 are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is  
 8 and the ground upon which it rests.'" *Erikson v. Pardus*, 127 S.Ct. 2197, 2200 (2007) (citing *Bell*  
 9 *Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007)); *see also* Fed.R.Civ.P. 8(a) (a complaint must  
 10 include a "short and plain statement of the claim showing that the pleader is entitled to relief")  
 11 and Fed.R.Civ.P. 8(e) ("each averment of a pleading shall be simple, concise, and direct"). The  
 12 liberal pleading standard is even more pronounced in the case of a *pro se* prisoner, where the  
 13 court must construe the pleadings liberally. *Erikson*, 127 S.Ct. at 2200.

14 However, with regard to "fair notice," the court also recently stated:

15 While a complaint attacked by a Rule 12(b)(6) motion to dismiss  
 16 does not need detailed factual allegations, *ibid.*; *Sanjuan v.*  
 17 *American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251  
 18 (C.A. 7 1994), a plaintiff's obligation to provide the "grounds" of  
 19 his "entitle[ment] to relief" requires more than labels and  
 20 conclusions, and a formulaic recitation of the elements of a cause  
 21 of action will not do, *see Papasan v. Allain*, 478 U.S. 265, 286,  
 22 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (on a motion to dismiss,  
 23 courts "are not bound to accept as true a legal conclusion couched  
 24 as a factual allegation"). Factual allegations must be enough to  
 25 raise a right to relief above the speculative level, *see* 5 C. Wright  
 & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235-235  
 (3d ed. 2004) ... ("[T]he pleading must contain something more ...  
 than ... a statement of facts that merely creates a suspicion [of] a  
 legally cognizable right of action"), on the assumption that all the  
 allegations in the complaint are true (even if doubtful in fact), *see*,  
*e.g., Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508, n. 1, 122  
 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Neitzke v. Williams*, 490 U.S.  
 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) ("Rule 12(b)(6)  
 does not countenance ... dismissals based on a judge's disbelief of  
 a complaint's factual allegations") ... .

26 *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007). The court further noted that  
 27 some factual detail is necessary:  
 28

1 [W]hile, for most types of cases, the Federal Rules eliminated the  
 2 cumbersome requirement that a claimant 'set out *in detail* the facts  
 3 upon which he bases his claim,' ... Rule 8(a)(2) still requires a  
 4 'showing,' rather than a blanket assertion, of entitlement to relief.  
 Without some factual allegation in the complaint, it is hard to see  
 how a claimant could satisfy the requirement of providing not only  
 'fair notice' of the nature of the claim, but also 'grounds' on which  
 the claim rests.

5  
 6 *Id.* at 1965, n.3 (quoting Wright & Miller § 1202, at 94, 95 ("Rule 8(a) 'contemplate[s] the  
 7 statement of circumstances, occurrences, and events in support of the claim presented' and does  
 8 not authorize a pleader's 'bare averment that he wants relief and is entitled to it'")).

9 Thus, a claim must proceed beyond the motion to dismiss stage even if the court does not  
 10 believe the facts set out in the complaint; however, if there is a complete absence of  
 11 "circumstances, occurrences, and events" to support the claims the plaintiff is making, then the  
 12 complaint does not meet the requirements of Rule 8(a). Such is the case here.

13 In *Erickson*, the prisoner claimed that defendants removed him from a program to treat  
 14 his hepatitis C because defendants allegedly found that he had violated the program's rules  
 15 (although the prisoner claimed he had not). *Erikson*, 127 S.Ct. at 2198. The prisoner alleged that  
 16 by removing him from the program, defendants had violated his right to medical treatment  
 17 pursuant to the Eighth Amendment. *Id.* In his complaint, the prisoner named the defendants who  
 18 had allegedly violated his rights, the dates and the reasons. *Id.* The District Court dismissed the  
 19 claims on a motion to dismiss after concluding that the prisoner had failed to allege that the  
 20 defendants' actions had caused him "substantial harm. *Id.* The Court of Appeals for the Tenth  
 21 Circuit affirmed. *Id.* at 2199. The Supreme Court reversed, holding that it was error for the  
 22 Tenth Circuit to find that plaintiff's allegations were too conclusory to establish for pleading  
 23 purposes that petitioner had suffered a cognizable independent harm as a result of his removal  
 24 from the treatment program. *Id.* at 2200. The Court found that plaintiff's allegation that  
 25 defendants' actions were "endangering his life" was sufficient. *Id.*

26 As opposed to the prisoner in *Erikson*, plaintiff here has failed to put defendants on notice  
 27 as to which "circumstances, occurrences, and events" violated his rights. Even where plaintiff  
 28 actually lists specific defendants in his counts, he fails to state what actions defendants' took to

1 allegedly violate his rights; instead, plaintiff makes “blanket assertions” that defendants generally  
 2 violated his “rights,” without listing any facts as to *how* his rights were violated. *See e.g.*, #7, pp.  
 3 4 and 5. Further, in some counts, plaintiff simply states that “all named defendants” generally  
 4 violated his rights, without specifying how. *See e.g.*, #7, pp. 5-C. Defendants argue that because  
 5 all of the defendants are spread amongst five prison facilities, “it is impossible to determine which  
 6 acts plaintiff complains of as being attributable to any particular defendant on any date at any  
 7 prison” (#17, p. 18). Plaintiff additionally specifies no dates on which each of the alleged  
 8 violations occurred, only generally stating that defendants “often” violated his rights, or that he  
 9 “rarely” receives his constitutional rights. While plaintiff is not required to set out in detail the  
 10 facts upon which his claims rest, some factual detail is necessary to put defendants on notice as  
 11 to how they violated plaintiff’s rights. *Bell Atlantic Corp.*, 127 S.Ct. at 1965. n.3.

12 For instance, in count V, plaintiff alleges:

13 ALL NAMED DEFENDANTS LISTED ABOVE... inflicted  
 14 cruel [sic] and unusual punishment in numerous ways, like  
 15 covering my suicide window cell door with paper causing  
 16 claustrophobia [sic], mental and emotional abuse to a patient who  
 17 should be receiving positive therapeutic [sic] therapy, tampering  
 18 [sic] and depriving me of my religious diet meals, refusing to  
 19 ensure I was receiving [sic] positive mental health and medical  
 20 care, #excessive [sic] sanctions for minor infractions, use of false  
 and/or vague NOCs to place me in segregation, deprive me of  
 Civil and Constitutional rights, by inflicting cruel and unusual  
 punishment [sic] in the form of retaliation for me asserting my Civil  
 and Constitutional rights [sic], inflicting unnecessary [sic] and  
 wanton pain that had no justifiable [sic] penological interest but  
 was inflicted simply because I was insistent [sic] on asserting my  
 Civil and Constitutional rights. ...

21 Cruel and unusual punishment [sic] can also be the forcing of me  
 22 to eat non-Kosher food as a punishment for violating a minor  
 infraction of prison [sic] rules. ...

23 Further when a defendant [sic] deprives me of medically  
 24 prescribed medication by a professional doctor for reasons not  
 related to medical reasons may exhibit deliberate indifference.

25 *See* #7, p. 5-C. None of plaintiff’s contentions puts defendants on notice as to, for example,  
 26 which defendants may have forced plaintiff to eat non-kosher foods, or which defendants  
 27 deprived plaintiff of medication, what the medication was, and for what reasons “not related to  
 28 medical reasons.” One of plaintiff’s main contentions is that the notices of charges he frequently



1 receives are false and unwarranted. Plaintiff claims, "most if not all NOCs filed against [sic] me  
2 contain false notice of charges" (#7, p. 5-I). This type of allegation does not come close to putting  
3 defendants on notice as to *which* notices of charges plaintiff is challenging. It is not defendants'  
4 burden to comb through all of plaintiff's many disciplinary hearings at the various institutions in  
5 which he has been incarcerated over the years to identify officers who have allegedly violated  
6 plaintiff's rights.

7 After carefully reviewing plaintiff's complaint, the court agrees with defendants'  
8 characterizations.<sup>3</sup> Moreover, local rule 7-2 states "[t]he failure of an opposing party to file points  
9 and authorities in response to any motion shall constitute a consent to the granting of the motion."  
10 L.R. 7-2(d). The court has duly warned plaintiff of the consequences of failing to file an  
11 opposition; thus, the court finds that plaintiff consents to defendants' arguments. Based on the  
12 foregoing, the court concludes that plaintiff has failed to sufficiently put defendants on notice as  
13 to how defendants allegedly violated plaintiff's rights.

### 14 **3. Conspiracy**

15 Plaintiff also makes numerous general claims that defendants have conspired against him  
16 to violate his constitutional rights (#7, pp. 2-2U, 3, and 5-H). To state a claim for conspiracy  
17 pursuant to 42 U.S.C. § 1985(3), a plaintiff must demonstrate: "(1) conspiracy; (2) for the purpose  
18 of depriving, either directly or indirectly, any person of class of persons of the equal protection  
19 of laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of this  
20 conspiracy; (4) whereby a person is either injured in his person or property or deprived of any  
21 right or privilege of a citizen of the United States." *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529,  
22 1536 (9th Cir. 1992). A review of plaintiff's complaint reveals that plaintiff has failed to state  
23 which defendants conspired together, when they conspired, and what acts they allegedly took to  
24 further the conspiracy. Plaintiff's conspiracy claims are dismissed.

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25  
26 <sup>3</sup> For purposes of brevity, the court does not here set out each allegation in plaintiff's very lengthy  
27 complaint. Defendants have set out the allegations contained in each of plaintiff's counts, arguing that the  
28 allegations fail to state what actions defendants have taken to violate plaintiff's rights, how they violated the  
right, and when (#17, pp. 7-18). The court has carefully reviewed each count in plaintiff's complaint, and  
finds that defendants' motion has merit.

#### 4. Failure to Exhaust Administrative Remedies

Defendants alternatively argue that plaintiff's claims must be dismissed because he has failed to exhaust his administrative remedies (#17, p. 6). The Prison Litigation Reform Act of 1996 (the "PLRA") amended 42 U.S.C. § 1997e to provide that "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (2002). Although once within the discretion of the district court, the exhaustion of administrative remedies is now mandatory. *Booth v. C.O. Churner*, 532 U.S. 731 (2001). Exhaustion of administrative remedies is not a pleading requirement; thus, prisoners are not required to specifically plead or demonstrate exhaustion in their complaints. *Jones v. Bock*, 127 S.Ct. 910, 919-921 (2007).

Defendants have properly raised the issue of exhaustion in a motion to dismiss. Since plaintiff did not oppose defendants' motion, there is no evidence before the court with which to determine whether plaintiff exhausted his administrative remedies for each of his claims. Plaintiff states in his complaint that he has exhausted all of his administrative remedies by appealing his notices of charges and by filing "numerous" grievances regarding defendants' conduct during his NOC hearings (#7, p. 8A). Plaintiff also claims that the grievance process is no longer available to him. *Id.*

Even taking plaintiff's general claims of exhaustion as true, it remains impossible to determine for which counts plaintiff has exhausted his remedies. Because plaintiff fails to identify which hearings and NOCs he is challenging, the court cannot determine whether plaintiff has exhausted his remedies. Moreover, by failing to file a motion in opposition to defendants' motion to dismiss, plaintiff consents to defendants' argument that he failed to exhaust. L.R. 7-2(d). Thus, the court grants defendants' motion to dismiss on the alternative ground of failure to exhaust administrative remedies.

### III. CONCLUSION

Based on the foregoing and for good cause appearing, the court concludes that plaintiff does not have a private right of action pursuant to 18 U.S.C. §§ 1001, 1621, and 1518 and 42



1 U.S.C. § 10841, and that 18 U.S.C. § 1061 is inapplicable here. The court further concludes that  
2 plaintiff's allegations do not meet the requirements of Federal Rule of Civil Procedure 8(a) so as  
3 to put defendants on notice as to the claims against them. The court further concludes that  
4 plaintiff has failed to make allegations specific enough to allege a conspiracy claim, and that it  
5 is unclear whether he has exhausted his administrative remedies due to his vague allegations. As  
6 such, the court recommends that defendants' motion to dismiss (#17) be **GRANTED**.

7 The parties are advised:

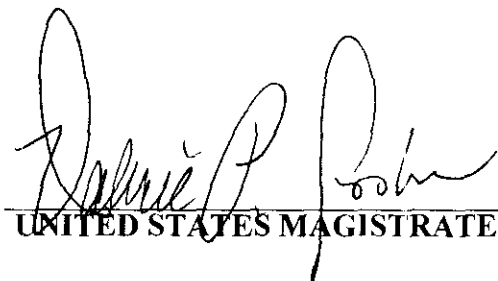
8 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,  
9 the parties may file specific written objections to this report and recommendation within ten days  
10 of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and  
11 Recommendation" and should be accompanied by points and authorities for consideration by the  
12 District Court.

13 2. This report and recommendation is not an appealable order and any notice of appeal  
14 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's  
15 judgment.

16 **IV. RECOMMENDATION**

17 **IT IS THEREFORE RECOMMENDED** that defendants' motion to dismiss (#17) be  
18 **GRANTED**.

19 **DATED:** November 27, 2007.

20   
21 **UNITED STATES MAGISTRATE JUDGE**  
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